

## THE MEDICO-LEGAL ASPECTS OF VENEREAL DISEASE\*

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MADAM PRESIDENT, LADIES AND GENTLEMEN,—In the first place I should like to stress the difficulty of discussing the conflicting views which usually arise when the medical practitioners meet their legal brethren.

For the past 150 years the subject of privilege has occupied the attention of both the medical and legal professions and to a certain extent the lay Press. Much discussion has taken place in that time, and up to the present day the rule of disclosure in the Courts has never been relaxed for all practical purposes, and any attempt to arrive at a harmonious conclusion has always been rigidly opposed by the legal profession. I, therefore, now propose to place before this meeting a historical survey of the position and to elaborate to some extent the arguments which have been employed from both aspects. Having dealt with the general conditions prevailing in the Courts with regard to medical evidence I will pass on to the particular points appertaining to venereal disease.

It is the law of this country that secrets of patients obtained by medical men in the course of their profession cannot be withheld from a Court of Law if their revelation be necessary for the purposes of the law.

Medical men may be compelled to disclose communications made to them in professional confidence.

Apart from State officials, such as Ministers of the Crown, Judges of the High Court and others placed in similar positions of more or less supreme authority, protection so far as professional secrecy is concerned is practically confined to the law and the Church. Barristers are naturally precluded from being required, in giving evidence, to disclose matters which are communicated to them by a solicitor, and solicitors are similarly precluded

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in regard to the confidence of a client. A solicitor who betrayed such confidence, when he went to the Court, would probably be struck off the rolls.

The exact origin of the rule is lost in the past, but it was founded on professional custom, backed by strong common sense.

So far as the Church is concerned, the privilege appeared to have gained recognition on sentimental grounds which are respected by the Courts.

In the case of the medical profession, the recognition given in certain countries is much greater than here. Under the penal code of France, imprisonment is imposed for disclosure of professional matters without consent of the patient. A similar enactment exists in some seventeen of the States in America.

In Scotland, in the Court of Session, it has been decided that "secrecy is an essential condition of contract between a medical man and his employers, and a breach of secrecy affords a relevant ground for an action of damages."

In England there is great confusion of thought and decision as arising out of recorded cases and dicta of Judges.

The leading case settling the law of this country that a medical witness cannot claim any such privilege was laid down at the trial of the Duchess of Kingston for bigamy, before the House of Lords in 1776. Lord Mansfield, C.J., said "that if a surgeon were voluntarily to reveal those secrets, to be sure he would be guilty of a breach of honour and of a great indiscretion, but to give that information in a Court of Justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

The same rule was followed by Park, B., in *R. v. Gibbons* (1823)—"that is no sufficient reason to prevent a disclosure for the purpose of justice,"—and in *Broad v. Pitt*, Bert, C.J., stated that—"there is no privilege of this description in the case of a medical man." On the other hand, in *Kitsons v. Playfair* (1896), a libel action, where the defendant had published a statement that the plaintiff had "had a miscarriage under such circumstances that her pregnancy could not have been of a legitimate character," Hawkins, J., in course of his judgment, was extremely sarcastic in his reference to the medical man who disclosed what he did in that case, and went to the

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length of saying that it would make him extremely careful what medical man he himself consulted in the future.

In January, 1896, the Royal College of Physicians of London sought the opinion of two eminent counsel, namely, Sir Edward Clarke and Mr. Horace Avory. The question was put: "Has a medical practitioner any privilege with regard to secrets confided to him in the course of his practice analogous to the privilege as between solicitor and client or otherwise?" Opinion: "We are of opinion that there is no privilege attaching to statements made to a medical practitioner by his patient."

Certain observations of Avory, J., at the Birmingham Assizes in 1915 brought the question into prominence again. It concerned the case of a woman, who had been committed on a coroner's warrant on a charge of manslaughter following an illegal operation. The deceased had confided the name of the person who performed the act to at least one of the three medical men who attended her. The learned Judge in the course of his remarks said: "I cannot doubt that it is the duty of the medical man to communicate with the police for the purpose of assisting the administration of justice, by taking the necessary steps to procure a dying declaration. No one would wish to see disturbed the confidential relation which exists, and which must exist, between the medical man and his patient, in order that the medical man may properly discharge his duty towards his patients, but there are cases, of which it appears to me that this was one, where the desire to preserve that confidence must be subordinated to the duty which is cast upon every good citizen, to assist in the investigation of a serious crime, such as is here imputed to this woman."

This led the medical profession to send an important deputation to the Lord Chief Justice (Lord Reading), the Law Officers of the Crown and the Director of Public Prosecutions (Sir Charles Mathews), to confer on the subject of professional secrecy. On that occasion Sir Charles Mathews was particularly desirous that the medical profession should consent to act in a manner as private detectives in the discovery of crime. This the deputation flatly declined to recognise in any sense whatever, and were successful in disabusing his mind of the idea that the profession would act in that capacity.

A new departure was heralded by the Public Health

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(Venereal Diseases) Regulations, 1916, Article 11 (2), as follows: "All information obtained in regard to any person treated under a scheme approved in pursuance of this Article shall be regarded as confidential." The Regulations governing the treatment of venereal disease in this country are framed to ensure a system so discreet that not only is the patient safeguarded by anonymity but it is practically impossible to trace the origin of any case at a public clinic. Unfortunately the protection under the Regulations is overridden when necessities of a law-suit demand that a medical man shall divulge information that he has learned in professional confidence. The leading case in this conflict is *Garner v. Garner* in 1920. The facts of the case are as follows. The petitioner was the wife, and adultery by the respondent was proved; the cruelty consisted in the communication of syphilis by the respondent to the petitioner. The Medical Officer of the Venereal Department, Westminster Hospital, was called to prove that the petitioner was suffering from syphilis. Before being sworn, he handed to the Judge a letter from the Chairman of the House Committee stating that the Westminster Hospital had adopted the national scheme for dealing with venereal disease, and calling attention to the statutory regulations, one of which enjoined secrecy. In this case, therefore, it was not a question of betraying the confidence of a patient, but of infringing an official regulation. McCardie, J., made the following observations: "The doctor (of the venereal centre) was one of those who were desirous of assisting the scheme for treating venereal disease in every way, and for the purpose he wished loyally to maintain the secrecy which was rightly upon him. But the witness would appreciate that in a Court of Justice there were even higher considerations than those which prevailed with regard to the position of medical men. He wished to say that apart from the obligations which might be imposed on medical men by the order of His Majesty's Judges, it was desirable that there should be the most loyal observance of the confidence which was reposed in them by patients. He was glad to say that the history of the medical profession was most honourable, and it was to be hoped that its members would always retain the confidence placed in them."

McCardie, J., thus made it quite clear that the medical

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man's duty to assist justice by giving evidence was paramount. The rule was adopted in the cases of *Devonshire v. Devonshire and Eve*, and *Needham v. Needham and Barrett* in the High Court in 1921, with result that the attention of the Ministry of Health was drawn to the fact that the medical officer of a venereal diseases clinic must give evidence in a civil case as to the condition of a patient under his care at the clinic, thus violating the confidence between doctor and patient and the direct undertaking by the Local Government Board, the predecessor in title of the Ministry of Health, that all proceedings at such clinics should be absolutely secret and confidential. Legislative steps should be taken as would render such an occurrence impossible in the future.

However, the Ministry of Health, with their usual Civil Service excuse, a policy adopted which many deplore, could not be drawn to offer any suggestion in the matter, and it was left for individuals to raise the question in Parliament.

Lord Dawson placed upon the Order Paper of the House of Lords a motion intended to raise the question of a doctor's obligation to disclose, or to keep secret, what he learned in his professional capacity when called upon to answer in a Court of Law. The motion was withdrawn, but his remarks in another place are both interesting and instructive. "Various privileges have been obtained by and for the legal profession for smoothing its procedure and securing its place, for which he did not blame the lawyers for so doing, and was inclined to wish that the medical profession had been similarly insistent. A lawyer did not like any obstacle put in his path. The question for medical men was whether they were going to stand out for a form of privilege over and above that accorded to a member of the public. He maintained that they should demand a measure of special privilege. Having obtained the concession of privilege he was quite willing that the limits and application of the privilege should be discussed between medical and legal gentlemen. The priests also had privilege. The doctor was even more concerned with the intimacies of human life and was really nearer to the heart of things than a minister of the Church. How often had they seen a patient lying in sickness with something on his mind and quite unable to get better until he had confessed it. The confession was

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one which he made in a moment of weakness and would not have made had he been in health. He pleaded for a strong unequivocal statement that the profession was in favour of special privilege being granted to medical men in Courts of Law."

Lord Birkenhead, L.C., in his article, "Should a Doctor Tell?" from Vol. I. of "Points of View," in discussing the motion of Lord Dawson, sums up the legal aspect, as follows: "The whole tendency of our law for many years has been in the direction of opening the mouths of those who can assist the course of justice and not closing them. The obligation of silence with regard to professional communications to lawyers has of late years become more extensive. It has grown as circumstances required under the hand of the judiciary who can be trusted to curb any abuse of it, but it is not such a privilege (medical) as is now claimed. Now to establish a class who may at will assist or obstruct the Judges in their work would be a retrograde step, not justified by any argument which has been brought forward. These are the opinions, not only of myself, speaking with all the responsibility which accrues to me as Lord Chancellor, but of most men of experience in every branch of law. I have no doubt that opinion is shared by the great majority, perhaps all Judges of the High Court. It is shared by those most fitted to give an opinion at the Bar. I am convinced that it is consonant with the whole scheme of our judicial history and that it rests upon a solid basis of equity and common sense."

Towards the end of 1928, Sir Ernest Graham Little introduced a Bill in the House of Commons which would give to medical men a protection of professional confidence, very moderate compared with that now enjoyed by lawyers and expressly not applicable to shielding a felony. The Bill received its first reading without division, but was met with opposition as to its further progress from the lawyers of both Houses; consequently it lapsed with the Session. He was further discouraged from introducing the measure again on the grounds that the matter was considered too important to be dealt with other than as a Government measure.

Lord Atkin, a Lord of Appeal, later commenting on the measure, stated: "As the law stood at the present, a doctor was not privileged to maintain his patient's con-

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fidence. The claims of justice on one side had to be weighed against the claims of public health on the other. He was of the opinion that in some cases, notably those connected with venereal disease, the claims of public health far outweighed those of justice. The Courts allowed certain facts to be withheld, for instance disclosure between solicitor and client, and those which concerned the State were withheld without any reference to the administration of justice. He failed to see why it might not be just of as much interest to withhold some facts, for instance as those relating to armaments. He recognised the extreme public importance of mutual understanding between lawyers and doctors and familiarity with each other's problems."

On October 1st, 1934, it was judicially held at the Mayor's and City of London Court, that a tuberculosis officer need not voluntarily produce his dispensary records. The officer made a protest, both on the general ground that the evidence required of him was obtained by him in confidence as a medical practitioner, and under special ground of a statutory obligation to secrecy. The Public Health (Tuberculosis) Regulations, 1930, Article 10, directs that: "Every notification and every document relating to a person notified under these Regulations shall be regarded by the Medical Officer of Health and by every person who has access thereto as confidential." The Public Health Act, 1896, Section 1, Sub-section 3, as the witness reminded the Court, refusal to obey the Regulations would expose him to a penalty of £100. The Judge upheld the protest, and the tuberculosis officer was absolved from giving evidence. The Mayor's and City of London Court is classified as an inferior Court of Record, and therefore judgments emanating from this source do not influence the main issue, but the case illustrated that judicial opinion was impressed by the argument. It is hardly necessary to add that regulations made under an Act of Parliament have just as much force as the Act itself, unless a competent Court holds that they are *ultra vires*. Parliament has enjoined the principle of secrecy in a wide variety of circumstance such as income tax, census information, telegrams and the Adopted Children's Register, though in these special cases the protection is not absolute and official disclosure (as in criminal proceedings for fraud) are not unknown. Such analogies,

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however, lack the all-important element of confidential relationship which exists between patient and doctor.

In recent months the question of professional confidence in relation to police investigation of crime has come before private practitioners. It arose last July, when the Chief Constable of Brighton was making inquiries in the Brighton Trunk Mystery No. 1. The opinion of some members of the medical profession was expressed as follows: "The request by the police to a member of the medical profession to give the names and addresses of any patients who had consulted the practitioner for symptoms particularised by the police ought to be declined on the ground that to accede to such a request would be a gross breach of professional confidence and might well involve the practitioner in an action for damages by the patient or patients concerned." The view was not accepted by the profession, the position finally arrived at was one of compromise: "That the disclosure should be a matter for the conscience of the individual doctor, as the medical practitioner should not forget that he was also a citizen and should do what he could to help the authorities to discover the author of a brutal crime."

Venereal disease, with the exception of ophthalmia neonatorum, is not a notifiable disease under the Public Health (Notification of Infectious Disease) Regulations, 1918. This is an attempt by the legislature to preserve the secrecy with regard to persons treated under the scheme by limiting official recognition of the disease to the bare essentials required. The State realises that the success of a V.D. scheme depends largely upon the principle that the utmost secrecy must be maintained to ensure the attendance of patients at the earliest opportunity when signs of disease appear and treating them on those lines until they are rendered permanently non-infective. The Central Authority has always taken great pains in the administration of the scheme to make the likely sufferers fully aware of these conditions of treatment in an unostentatious manner. The fear of discovery has deterred many patients from seeking advice at a public clinic, causing them to resort to chemists, quacks and practitioners not skilled in the treatment of this disease, and deliberately delay attendance at the centre until some complication has frightened them or their funds have run low.



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However, these measures are to some extent negated or impaired by the knowledge of the general public of the fact that the rule of absolute disclosure of evidence by medical men operates in the Courts if requested by the Judge. This has led to vigorous and often undignified protests against giving evidence in these matters by medical officers of V.D. clinics which are unfortunate as they give rise to widespread publicity in the lay Press with its pernicious consequences. The problem must be tackled from a different standpoint, that is to say, that the proper preservation of professional secrecy necessitates a measure of special consideration being recognised for medical witnesses in Courts of Law above and beyond what is accorded to ordinary witnesses. Perhaps this might be a useful item of agenda for the Statute Law Revision Committee to consider.

Before leaving the Venereal Diseases Regulations I wish to point out that there should be free and unfettered communication between practitioners who have a direct and common interest in a case of venereal disease. This information should be given in confidence and a note should be inserted to that effect, such as is printed on the model B.M.A. form for consultative opinion, and on the reports received from the leading hospitals. Such withholding of necessary information is not in the best interest of the patient and not an act of good faith.

I will now pass on to the reliability and necessity of medical evidence in relation to venereal disease. It has been stated that there is a misuse of the services of the V.D. medical officers at clinics to compel them to come up to furnish evidence for divorce. Some patients make use of their attendance at the centre as proof of their adultery. It is practically impossible to obtain an ocular demonstration of the act of adultery, so litigants make use of other available evidence which will appear unassailable. Therefore, evidence of venereal disease has come to be regarded as in many instances a proof of adultery without inquiring into the merits of the case. I have no doubt that this Society is in a position to give numerous examples and illustrations to show that medical evidence on the question of venereal disease can be both misleading and dangerous. There is a suggestion that a medical assessor might be available to assist the Court in valuing the testimony in order to prevent a mis-

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carriage of justice. The Bar is willing to admit that the ability to cross-examine a professional expert witness well is rare. However, it is just as well to consider the opinion, none too flattering of the Bar, with reference to expert testimony from one of the standard books on "Evidence."

"Some of the Courts have very plainly intimated that this class of witness is very unreliable. A professional expert witness has been defined 'to be a man who is paid a retainer to make a sworn argument.' Experts as a class are shrewd and cunning, and are usually selected on account of their eminence in their professions or skill in their avocations, and they are presumed to speak guardedly and carefully upon topics with which they have the greatest familiarity, for often they stake their reputations upon the result of the trial in which they are called to testify.

"It often happens that the so-called experts are mere shams and pretenders and utterly unqualified to express an opinion upon the subject under investigation. But, if the testimony of the expert witness is not to be shaken it is better to examine him on a few unimportant matters and then let him go." There is some measure of truth in this indictment which could even be enlarged upon.

The diagnosis of syphilis frequently relies upon Wassermann and other serological reactions as well as the finding of the *Spirochæta pallida* in lesions, and that of gonorrhœa upon the evidence of the gonococcus in discharges. Experienced pathologists will admit that there may be always an element of doubt whether these tests are sufficiently accurate *primâ facie* to be utilised as evidence in a Court of Law. Particularly in divorce proceedings the moral effect of such a charge, if proved, will be devastating to the person involved. Specimens are liable in a fractional percentage of cases to be confused and there is no fool-proof scheme yet devised to obviate this error. The labelling and identifying of specimens in the best regulated laboratories has been known to break down.

The standard of reading in laboratories differs sometimes in marked degree, which was proved by the report given at the Serum Conferences at Copenhagen in 1923 and 1928. As a result, in the leading clinics and practices, all sera reactions are performed at the first attendance,

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irrespective of the report issued from the previous source. Such a practice very often saves an erroneous diagnosis.

A pathologist is usually not subpoenaed to give evidence of the results of the test, and consequently the clinician is virtually giving hearsay evidence, which is inadmissible. The collection of specimens is not performed with the extreme care with which those are taken for an ordinary police court prosecution for adultery of food and drugs, yet the results accepted quite formally are capable of giving rise to grave miscarriages of justice.

It will be observed from this sketchy outline there is room for much reversion of procedure with regard to the character of medical evidence on legal and ethical grounds.

To accomplish this, the sooner the members of the legal and medical professions meet on a common ground and settle down to a reasonable unbiassed discussion, each adding without prejudice his quota to the common stock, the better it will be for the reputation of British justice.